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In The

SUPREME COURT OF THE UNITED STATES

October Term 1962

Case No. 717

LYNCHBURG TRAFFIC BUREAU (Corp.),
Petitioner,

v.

SMITH'S TRANSFER CORPORATION
OF STAUNTON, VA.,
Respondent.

PETITION OF LYNCHBURG TRAFFIC BUREAU FOR WRIT OF CERTIORARI

AND APPENDIX

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TABLE OF CONTENTS

	Page
Statement	1
The Opinion	2
Jurisdiction Involved	2
Questions	2
Statutes	3
The Facts	4
Federal Jurisdiction	6
Argument	6
Appendix	15
Opinion, U.S. Court of Appeals	15
Opinion, U.S. District Court for Western District of Virginia	18

CASES CITED

Dry Goods, Piece Goods, Dependent Upon Value, 53 M.C.C. 157 ..... 7, 8, 9

Hewitt-Robins, Inc. v. Eastern Freightways, Inc., 9 L ed 142 ..... 2, 11

Lynchburg Traffic Bureau v. Smith's Transfer Corporation, 310 I.C.C. 503 9

Montana-Dakota Utilities v. Northwestern Public Service, 341 U. S. 246 8

Pensick & Gordon, Inc. v. California Motor Express, No. 222, December 3, 1962 ..... 2, 11

T.I.M.E. Inc. v. United States, 359 U. S. 464 ..... 1, 10

STATUTES INVOLVED

49 U. S. C. 8 (p. 487) 3, 12

49 U. S. C. 16(12) (p. 56-57) 12

49 U. S. C. 20(11) (p.p. 114-116) 4, 6

49 U.S.C. 305 (g) (p. 54) 3, 12

49 U. S. C. 316(d) (p.p. 144-145) 4, 5

49 U. S. C. 319 (p. 163) 3, 6

28 U. S. C. 1254(1) 2

28 U. S. C. 1291 2

28 U. S. C. 1337 ..... 2, 6

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STATEMENT

Comes now petitioner, the Lynchburg Traffic Bureau, and seeks a review of the judgment of the Court of Appeals for the Fourth Circuit, which judgment affirmed a judgment of the District Court for the Western District of Virginia. The judgment of the District Court was to the effect that:

> "I conclude that the facts of this case bring it squarely within the armpit of the decision of the Supreme Court in the case of T.I.M.E., Inc. v. U. S., 359 U. S. 464."

The decision of the District Court and the decision of the Court of Appeals were rendered before this Honorable Court, on November 19, 1962, rendered its decision in Hewitt-Robins, Inc. v. Eastern Freightways and its decision in Case No. 222, Pensick & Gordon, Inc. v. California Motor Express, et al, decided December 3, 1962. Petitioner believes that the judgment of the District Court and that of the Court of Appeals would have been for petitioner had the decision of this Honorable Court in Hewitt-Robins, Inc. v. Eastern Freightways supra been rendered prior to the time the District Court and the Court of Appeals rendered their decisions in this action.

THE OPINION

The opinion of the District Court appears at pages 18-25 and the opinion of the Court of Appeals appears at pages 15-17 hereto.

JURISDICTION INVOKED

The judgment of the Court of Appeals was rendered and entered on November 5, 1962 and the judgment of the District Court was rendered and entered on the 5th day of March 1962.

The statutory provision for review by the Court is found in 28 U.S.C. 1254 (1) and the jurisdiction of the District Court in 28 U.S.C. 1337 and of the Court of Appeals, 28 U.S.C. 1291.

QUESTIONS

The questions presented are:

(1) Does the Motor Carrier Act provide any remedy for a shipper against a certified common carrier by motor vehicle:

(a) for failing to comply with an order of the Interstate Commerce Commission, and

(b) making a charge for transportation which charge the Interstate Commerce Commission found to be unjust and unreasonable prior to the time the shipment moved; and

(2) Can a shipper, under the Motor Carrier Act, recover damage from a certified common carrier by motor vehicle for charging higher rates and charges than those the Interstate Commerce Commission found, prior to movement of the shipments, to be just and reasonable.

STATUTES

The statutes involved are: Section 205(g) of the Act, 49 U.S.C. 305(g), which provides that petitioner has a statutory right of relief in Court against respondent for enforcement of an order of the Interstate Commerce Commission; Section 16(12) of the Act, 49 U.S.C. 16(12) provides that petitioner may (as it did) apply to any district court of competent jurisdiction for enforcement of the order of the Interstate Commerce Commission entered on July 27, 1951 in Docket MC-C-1019 (tr. 23-24) and that the Court shall enforce obedience; Section 8 of the Act, 49 U.S.C. 8, provides that petitioner can collect from respondent full damage for respondent's disobedience to an order of the Interstate Commerce Commission; Section 219 of the Act, 49 U.S.C. 219, makes respondent sub-

ject to Section 20(11) of the Act, 49 U.S.C. 20(11), and Section 20(11) of the Act prohibits respondent from making any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any receipt or bill of lading, or any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission and declares the valuation charge respondent collected from petitioner, even though published in a tariff, to be unlawful and void unless the limitation of value has been expressly authorized or required by an order of the Interstate Commerce Commission; and Section 216(d) of the Act, 49 U.S.C. 316(d), provides that all charges shall be just and reasonable and pursuant all charges shall be just and reasonable.

THE FACTS

Beginning in July 1953 and continuing until 1960, petitioner received, via Smith's Transfer Corporation at Lynchburg, from New York, N. Y., numerous shipments of freight, including such articles as clothing and dry goods. The respondent, by tariff provision, required petitioner to declare the value on shipments of clothing and dry goods, by limiting the liability of respondent in case of loss, damage or injury to the said clothing and dry goods. Petitioner did release the value and paid to respondent a charge therefor equivalent to 20 cents per 100 pounds. This charge is prohibited by Section 20(11) of the Act, 49 U.S.C. 20(11) unless specifically authorized by the Interstate Commerce Commission. The record shows, by Plaintiff's Exhibit F, (tr. of record 25-27) that the Commission granted respondent relief in 1941 from the provisions of Section 20(11) of the Act and conditioned that relief or limited its use by requiring respondent to incorporate in its tariff the following provision:

"Charges herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Order No. MC-208 of May 21, 1941, subject to *complaint* or suspension" (tr. 25 thru 27). (Emphasis supplied)

The usefulness and validity of Released Rate Order No. MC-208 by its own terms and those published in a tariff, are subject to complaint and when a complaint was filed on January 13, 1949 in Docket MC-C-1019, the released rates order became ineffective.

The valuation charge assessed against petitioner was declared, under 49 U. S. C. 316(d), unlawful in 1951 by the Commission in the complaint case, Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157 (158 and 173), Exhibit 4 in the District Court, yet respondent has forced petitioner to pay that unlawful charge and has resisted this action. The Commission not only found the valuation charge unjust and unreasonable but entered an order on July 27, 1951 requiring the cancellation of the tariff provisions containing the valuation charge. This order was reproduced and introduced in evidence in the District Court as Plaintiff's Exhibit E (Tr. of record, pp. 23, 24). The exaction of those charges on the shipments included in this action is positive proof that the cancellation was not made by respondent as ordered. Consequently, the valuation charges were exacted from petitioner in violation of an order of the Interstate Commerce Commission and contrary to a finding of the Interstate Commerce Commission that the valuation charges, on July 27, 1951, were then and would be for the future, unjust and unreasonable. Furthermore, the valuation charge

has been exacted without specific authority from the Interstate Commerce Commission as required by Section 20(11) of the Act, 49 U.S.C. 20(11). The valuation charge being ordered canceled in 1951, has the effect of withdrawing the approval the Commission gave in 1941 and makes respondent's collection of the valuation charge a direct violation of 49 U. S. C. 20(11) to which section respondent is made subject by 49 U. S. C. 319.

There is a second issue in this action and that is, that respondent charged higher rates and charges from New York, N. Y. to Lynchburg than respondent maintains from White Plains, N. Y. through New York and Lynchburg to Gretna, Virginia. The Commission has held in several cases that higher rates and charges at intermediate points than to more distant points are prima facie unjust and unreasonable and admonished the respondents in 1949 and again in 1956 to remove the disparities in rates, which the respondent has not done (see 67 M.C.C. 741 and 49 M.C.C. 357).

FEDERAL JURISDICTION

This cause of action involves an Act of Congress regulating interstate commerce and the district court has original jurisdiction under 28 U. S. C. 1337.

ARGUMENT

In Paragraphs IV and V of Civil Action No. 523 and in Amendment to Civil Action No. 414 (tr. of record 3, 4 and 10), petitioner specifically alleged that respondent had charged a valuation charge on each shipment of cloth-

ing and dry goods and tendered evidence to show that respondent has done so contrary to an order of the Interstate Commerce Commission in Docket MC-C-1019 which order is reproduced as plaintiff's Exhibit E (tr. of record, P.P. 23 and 24) and contrary to the finding of the Interstate Commerce Commission that the valuation charge on and after July 27, 1951 would be unjust and unreasonable and this finding is found at 53 M.C.C. 157(173). The decision and order of the Commission were introduced in evidence at the trial in the District Court.

The District Court held that the T.I.M.E. Case "covers this situation like a blanket" and then said: "This case hasn't actually been heard and tried on the merits."

The Court of Appeals stated (tr. of record 37) that "on examination of the record as a whole, we are convinced that the District Court's findings are amply supported by the evidence and are clearly correct."

The District Court stated that this case hasn't actually been heard and tried on the merits. The record in the District Court contained the decision of the Interstate Commerce Commission in Dry Goods, Piece Goods, Dependent Upon Value, 53 M.C.C. 157, showing the valuation charge to be unjust and unreasonable and that the record before the District Court and the Court of Appeals contained a copy of the order of the Interstate Commerce Commission (tr. of record 23 and 24), requiring the cancellation of the valuation charge and that respondent did not cancel the valuation charge as ordered. These facts of record, petitioner respectfully submits, show: (1) that this case has not actually been heard and tried on the merits; and (2) that this case and the T.I.M.E. Case are different in facts

and a different law applies to each. An actual hearing on the merits will prove that the T.I.M.E. Case does not apply.

In this cause, there are involved important questions of federal law which are: (1) does the Interstate Commerce Act afford any relief to a shipper against a motor common carrier who has collected charges contrary to an order of the Interstate Commerce Commission; (2) does the Interstate Commerce Act give a shipper a right of relief to damage from a motor carrier who has disobeyed an order of the Commission; and (3) can a shipper, under the Motor Carrier Act, recover damage from a motor carrier who has charged rates and charges the Interstate Commerce Commission has found to unjust and unreasonable. This case presents questions of federal law which have not been decided by this Honorable Court but should be settled by this Honorable Court and involves conflict between decisions of this Court and the decisions of the lower courts in this case. There is a conflict in the decision in Montana-Dakota Utilities v. Northwestern Public Service Co., 341 U. S. 246, where this Court, at page 251, said:

> "We hold that the right to a reasonable rate is the rate to the rate which the Commission files or fixes",

and the decision in this case holding that the decision in the T.I.M.E. Case bars petitioner from the benefit of the rate and charges the Commission fixed. The rates or charges the Commission fixed are shown in Dry Goods, Piece Goods, Dependent on Value, reported at 53 M.C.C. 157, at page 173, where the Commission, after considering the lawfulness of the valuation charge on clothing and dry goods, said:

"In No. MC-C-1019, we find that the assailed ratings and provisions are, and, for the future will be, unjust and unreasonable."

Pursuant to that decision, the Interstate Commerce Commission issued the order shown at page 23 of the transcript of record, requiring the cancellation of the valuation charge, the pertinent part of which is:

"It is Ordered, * that the defendants in MC-C-1019 be, and they are hereby notified and required to cancel the assailed ratings and provisions on or before September 10, 1951 *."

This order was not obeyed by respondent and that fact is proven by the decision of the Interstate Commerce Commission in Lynchburg Traffic Bureau v. Smith's Transfer Corp., reported at 310 I.C.C. 503, where, at page 505, the Commission said:

"In Released Rates Order No. MC-239, issued prior to 1951, the conference was authorized to publish, on behalf of its members including Smith, rates and charges dependent on value, on clothing, including dry goods, subject to complaint and suspension. However, in 1951, released ratings and penalty ratings on dry goods, finished or unfinished, except when made wholly of cotton, were considered in Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157. Therein, Division 3 found released ratings and penalty ratings on such traffic moving between points in Middle Atlantic territory and between that territory and New England territory, unjust and unreasonable, *and their cancellation was required.*" (Emphasis supplied).

The decision of the Interstate Commerce Commission further shows, at page 503, the following:

> "Prior to the institution of this proceeding, an action at law seeking damages for the alleged unlawful rates was brought in the United States District Court for the Western District of Virginia. In view of the decision in T.I.M.E., Inc. v. United States, 359 U.S. 464, our determination herein concerning the ratings applied and rates charged on past shipments will be restricted to the issue of applicability."

In these decisions, it is clear that the valuation charge was declared in 1951, to be unjust and unreasonable and its use required to be cancelled in 1951. Therefore, is petitioner entitled to damage from respondent for failing to maintain just and reasonable rates and charges fixed by the Commission and for disobeying an order of the Interstate Commerce Commission by charging petitioner different charges from those the Commission ordered to be charged on shipments of clothing and dry goods? Petitioner believes that there is conflict between the decision of the Court of Appeals in this cause and the decision of the Supreme Court in Hewitt-Robins, Inc. v. Eastern Freightways, 9 L ed 142 and that the conflict can be removed by granting the petition and the relief it seeks. Then, there is conflict between the decision of the lower courts and the provisions of the Interstate Commerce Act.

The decision of the Court of Appeals failed to comment upon the right of petitioner to relief under federal laws and under the findings of the Commission and so did the District Court and, in so doing, has decided a case in conflict with the decisions of this Honorable Court in

Hewitt-Robins, Inc. v. Eastern Freightways, Inc. (decided November 19, 1962), in ..... U. S. ....., 9 L ed 2d 142, 83 S. Ct. ....., and Case No. 222, Pensick & Gordon, Inc. v. California Motor Express, decided on December 3, 1962.

This action is identical in law with the decision of this Court in Hewitt-Robins, Inc. v. Eastern Freightways, 9 L ed 2d 142, decided November 19, 1962. In that case, Hewitt-Robins went to the Interstate Commerce Commission for the purpose of getting the Commission to determine, under the Act, whether or not it was reasonable and lawful for a motor carrier to carry unrouted intrastate shipments on its interstate routes at higher rates than those applicable to its available intrastate routes. The Commission found it unreasonable, under the Motor Carrier Act, 49 U. S. C., Sections 301-307. In the Hewitt-Robins Case supra, this Court, at pages 146 and 147, said:

> "Be this as it may, the survival of a judicial remedy under the saving clause of Section 216(j) cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends. Survival depends on the effect of regulations. According to Section 216(j) if the remedy is inconsistent with that scheme it does not survive. In T.I.M.E., Inc., we found inconsistencies and hence no judicial remedy survived. Here, as we have indicated, rather than running interference against the Act the exercise of the judicial remedy supports its overall purpose and is in nowise inconsistent with the Congressional scheme embodied within its four corners."

The record in this cause shows that the Commission, in 1951, found the valuation charges which petitioner is seeking to recover on clothing and dry goods to be unjust and unreasonable (see 53 M.C.C. 157, page 173) and issued in the same year (1951) an order directing respondent to cancel the valuation charge. Respondent did not cancel the aforesaid valuation charge, as ordered by the Commission but collected the valuation charge from petitioner during the years 1953 to 1960. The record further shows that in the complaint case (310 I.C.C. 503) of petitioner in 1960, the Commission reaffirmed the fact that the valuation charge on clothing and dry goods was found, in 1951, unjust and unreasonable and its cancellation required and the Commission again, in 1960, found the valuation charge unjust and unreasonable (see Lynchburg Traffic Bureau v. Smith's Transfer Corp., 310 I.C.C. 503).

The facts in this case show that the statutory scheme of regulation governing this case is provided, in addition to 49 U. S. C. 316(j), in Section 305(g), 49 U. S. C. 305(g), in which section petitioner has the same right of relief against respondent as that provided in Part 1 of the Act, 49 U.S.C. 1-26. In 49 U. S. C. 16(12), petitioner has the right to apply to the district court for enforcement of the order the Commission entered on July 27, 1951 (tr. of record 23 and 24) and that the district court shall enforce obedience to such order which obedience neither the district court nor the court of appeals has attempted to enforce, as they held that the T.I.M.E. Case governs. The Act, in our humble opinion, does not support the conclusion of the lower courts because when the district court, under 49 U. S. C. 16(12) enforces obedience to the order of the Commission dated July 27, 1951, a right to damage immediately arises under 49 U. S. C. 8. Thus, this case

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comes squarely within the principle in the Hewitt-Robins Case supra in that it is consistent with the statutory scheme of regulation to grant judicial remedy. The same relief also survives under 49 U. S. C. 316(j).

Wherefore, the failure to grant relief will be inconsistent with the statutory scheme of regulation but to grant relief will be the exercise of the judicial remedy that supports the overall purpose and is in nowise inconsistent with the Congressional scheme embodied within its four corners.

Petitioner respectfully prays that its petition be granted and that oral argument be had or else that the case be remanded to the lower court, as was done in Pensick & Gordon v. California Motor Express supra, for further consideration.

W. G. BURNETTE
Attorney for Petitioner

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Lynchburg, Virginia

January 3, 1962

CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Petitioner, hereby certify that I have this 2nd day of January, 1963, served a copy of the foregoing document upon the respondent by mailing a copy thereof to Bryce Rea, Jr., 919 Munsey Building, Washington 4, D. C., counsel for Respondent.

W. G. BURNETTE



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APPENDIX

OPINION
U. S. COURT OF APPEALS

* * *

SOBELOFF, Chief Judge:

This case, which has a rather extensive history, now comes before us on appeal for the third time. Lynchburg Traffic Bureau is a non-profit corporation created to assist shippers and receivers of freight in and near Lynchburg, Virginia, in local pickup, consolidation, movement, and delivery of shipments. The litigation was begun on February 25, 1958, when the Bureau instituted an action in the United States District Court for the Western District of Virginia against Smith's Transfer Corporation of Staunton, Virginia, a common carrier. The complaint recited that the carrier had been charging unreasonable rates and overcharges with full knowledge that the rates collected were unlawful.

After the District Court declined to grant a motion to dismiss, the defendant carrier then brought in this court a petition for mandamus to command the District Judge to dismiss the suit. We denied mandamus on the sole ground that the petition was tantamount to a premature appeal. *Smith's Transfer Corp.* v. *Barksdale,* 259 F.2d 498 (4th Cir. 1958).

Shortly afterwards the United States Supreme Court decided *T.I.M.E. Inc.* v. *United States,* 359 U.S. 464 (1959), holding that a shipper of goods by a certified com-

mon carrier may not challenge in a federal district court the reasonableness of a carrier's past charges made in accordance with the applicable tariffs. Relying upon the *T.I.M.E.* decision, the defendant carrier filed a motion for judgment on the pleadings on the ground that its freight charges were "properly computed at applicable rates duly filed with the Interstate Commerce Commission." The District Court then gave summary judgment for the defendant.

On appeal from this order, we remanded "because of the obscurity of the facts alleged," to afford the plaintiff an opportunity, if so advised, to seek permission from the District Court to file an amended complaint alleging facts which, if they exist, might entitle it to relief. *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp.*, 285 F.2d 743 (4th Cir. 1961). Our mandate specifically directed that "Before leave to amend is granted, the District Court should be satisfied by the plaintiff that the amended complaint will allege and the plaintiff intends to prove that the rates actually charged exceed the applicable filed rates; otherwise nothing could be gained by permitting amendment." *Ibid*, 745-46.

In April, 1961, plaintiff filed its amended complaint. In addition, it brought a new and separate action claiming that defendant had similarly charged illegal rates and overcharges in 1958, 1959, and 1960, as in the earlier years, 1953 to the filing of the original action. The two actions were consolidated and tried without a jury on November 22, 1961. From the evidence presented the District Court found that the challenged freight rates paid by the plaintiff had in fact been duly filed with the I.C.C. as the applicable tariffs for the transportation performed by defendant during the period in question. It also appeared beyond question that while the Commission had criticized these past rates and

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had admonished the defendant to voluntarily adopt corrective measures, it did not see fit to cancel those rates until new rates were filed on July 2, 1960—after the transportation of the shipments here in question. Concluding that the *T.I.M.E.* decision governed the issues raised, the District Court held that the plaintiff was entitled to no remedy and accordingly dismissed the consolidated actions. F. Supp. .

From an examination of the record as a whole, we are convinced that the District Court's findings are amply supported by the evidence and are clearly correct. The plaintiff asserted that the defendant exacted from it charges greater than those made for similar transportation between more distant points. However, it was shown at the hearing that additional charges were made for the pickup service on the shipments between those points—charges not imposed on the plaintiff. Thus, it was made affirmatively to appear that the challenged rates from New York to Lynchburg resulted in lower aggregate charges to plaintiff than those cited by it for comparison. Plaintiff's vigorous argument that the *T.I.M.E.* decision is distinguishable is without merit for the reason that the past charges which without merit for the reason that the past charges which are attacked as unreasonable were contained in rate schedules duly filed with the Commission and still remaining undisturbed when the charges were made.

Our conclusion that the plaintiff has failed to carry the burden of proof "that the rates actually charged exceed the applicable filed rates," *Lynchburg Traffic Bureau* v. *Smith's Transfer Corp., supra,* at 746, is dispositive of the case, making it unnecessary to consider plaintiff's other contentions.

Affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT LYNCHBURG, on the 5th day of March, 1962.

* * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This consolidated action having been tried upon the facts by the court without a jury, the court does hereby find the facts specially and states separately its conclusions of law thereon, and directs the entry of the appropriate judgment as follows:

FINDINGS OF FACT.

Plaintiff, Lynchburg Traffic Bureau, is a non-profit corporation created to assist shippers and receivers of freight in and near Lynchburg in local pickup, consolidation of movement and local delivery of shipments. On February 25, 1958, it instituted the first of these two consolidated actions (No. 414) against Smith's Transfer Corporation of Staunton, Virginia, a certificated common carrier by motor vehicle. The complaint charged that the plaintiff had, since June 10, 1953, received at Lynchburg from New York, "numerous less-than-truck-load shipments of various articles via Smith's Transfer Corporation, on which the defendant carrier had charged unlawful, unjust and unreasonable rates in an aggregate overcharge of $3,675.00, with full knowledge that the rates collected were unlawful."

On February 27, 1958, two days after this action was instituted, Smith's Transfer filed a complaint with the

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Interstate Commerce Commission, alleging that the rates charged it by Smith's Transfer, as set out in the complaint, were "unjust, unreasonable and discriminatory", and that, although they were the rates filed with the Commission, they were nevertheless not applicable, and prayed that Smith's Transfer be required to cease and desist from charging these rates, and that the Commission determine, for the past as well as the future, reasonable, just and lawful rates.

Defendant, on April 17, 1958, filed its motion to dismiss the complaint. Relying on *U. S.* v. *T.I.M.E., Inc.*, 252 F. 2d 178, *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337, and *U. S.* v. *Davidson*, 259 F. 2d 802, I overruled defendant's motion to dismiss and stayed further proceedings until the Interstate Commerce Commission, in the proceedings before it, should determine what rates were reasonable and applicable to the shipments in controversy. Smith's Transfer then filed its petition in our Court of Appeals for a mandamus to command me to dismiss the suit. Mandamus was denied by the Court of Appeals "on the sole ground that the petition was tantamount to a premature appeal". *Smith's Transfer &c.* v. *Barksdale*, 250 F. 2d 498.

On May 18, 1959, the Supreme Court decided *T.I.M.E., Inc.* v. *U. S.*, 359 U. S. 464, which had been consolidated with *U. S.* v. *Davidson, supra*. In this decision the Supreme Court held that a shipper of goods by a certificated motor carrier may not challenge in a federal court the reasonableness of a carrier's past charges made in accordance with the applicable tariffs. The court decided that the Motor Carrier Act, 49 U.S.C.A., Sec. 301 *et seq.*, did not confer on shippers a statutory cause of action for the recovery of past charges at unreasonable rates, and further that the Act

did not contemplate that shippers should have a common law right to sue for the recovery of unreasonable past rates. The Supreme Court also held that the District Court was not empowered to determine what rates are reasonable for past shipments, nor could it refer that issue to the Interstate Commerce Commission to exercise an auxiliary jurisdiction in aid of a jurisdiction the District Court did not possess.

Having meanwhile filed its answer, on March 18, 1960, defendant filed its motion for summary judgment on the pleadings. After hearing argument and considering the briefs, being of opinion that *T.I.M.E., Inc.* v. *U. S., supra,* which reversed the decisions of the courts of appeal in both *T.I.M.E., Inc., and Davidson,* was controlling, I entered an order on May 11, 1960, granting defendant's motion for summary judgment, and dismissed the plaintiff's action.

On appeal from this order, the Court of Appeals, by Sobeloff, Chief Judge, held that "While on the record before it, the court was correct in ordering dismissal of the proceedings, we will, because of the obscurity of the facts alleged, remand the case to give the plaintiff an opportunity, if so advised, within thirty days, to address an application to the discretion of the District Court for leave to file an amended complaint alleging facts, if they exist, which might entitle it to relief.

"Before leave to amend is granted, the District Court should be satisfied by the plaintiff that the amended complaint will allege, and the plaintiff intends to prove, that the rates actually charged exceed the applicable *filed* rates; otherwise nothing could be gained by permitting amend-

ment." *Lynchburg Traffic Bureau* v. *Smith's Transfer Corporation,* 285 F. 2d 743.

Upon receipt of the mandate of the Court of Appeals, I entered an order accordingly, granting plaintiff thirty days within which to move to amend its complaint, if it should be so advised. Plaintiff moved for leave to amend and tendered its proposed amended complaint. At its request, defendant was allowed time to object in writing, giving its reasons for its objection, to plaintiff's motion for leave to amend. At this point, I left the District for an extended period, and during my absence, Judge Dalton entered an order on April 26, 1961 permitting plaintiff to file its amended complaint. Defendant filed its answer to the amended complaint on May 3, 1961.

On April 5, 1961, Lynchburg Traffic Bureau instituted a new and separate action against Smith's Transfer Corporation (No. 523), the complaint alleging that, during the years 1958, 1959 and 1960, defendant had required it to pay unreasonable and illegal rates on numerous shipments during that period, and demanded a judgment against defendant in the sum of $3,500.00 for the alleged excessive freight charges. Since the second action (No. 523) and the first action (No. 414) involved common questions of law and fact, I entered an order on November 15, 1961, consolidating the two actions under the provisions of Rule 42 (a) F.R.C.P., and the consolidated action came on for trial by the court without a jury on November 22, 1961.

Plaintiff's amended complaint in No. 414 and its complaint in No. 523 allege, and its evidence in support of both complaints shows: (1) that the rates at which defendant performed the transportation for plaintiff from New York,

New York, to Lynchburg, Virginia, were higher than its rates from New York, New York, to points further therefrom than Lynchburg, Virginia; (2) that under defendant's rates its liability for loss or damage to property in transit was limited to 50 cents per pound or $50.00 per shipment, whichever was greater, unless plaintiff paid a valuation charge, i.e., a premium over the base rates, of 10 cents per hundred pounds or fraction thereof; (3) that the Interstate Commerce Commission had prior to the performance of the transportation in issue expressed the opinion that rates from New York, New York, to Lynchburg, Virginia, higher than rates from New York, New York, to points further therefrom than Lynchburg were improper, and had admonished carriers maintaining such rates to change them; and (4) that the Commission had prior to the performance of the transportation in issue directed the cancellation of tariff provisions similar to those at which defendant performed the transportation in issue in that they limited the carrier's liability for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was greater, unless the shipper paid a valuation charge of 10 cents per hundred pounds or fraction thereof.

Defendant's evidence shows (1) that the rates at which it calculated the freight charges plaintiff paid *were duly filed with the Interstate Commerce Commission pursuant to Section 217 (a)* of the Interstate Commerce Acts as the applicable rates for the transportation it performed; (2) that the Interstate Commerce Commission had authorized it to file and maintain the tariff provision under which it limited its liability to plaintiff for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was greater, unless plaintiff paid a valu-

ation charge of 10 cents per hundred pounds or fraction thereof; and (3) that it had in fact filed said provisions and in fact maintained it throughout the period during which it performed the transportation in issue. Defendant was not directed by the Commission to cancel this rate until June 2, 1960, long after the transportation of the shipments here in controversy.

Plaintiff argues vigorously that this case is distinguishable from *T.I.M.E., Inc.* v. *U. S., supra,* on the ground that here, unlike there, the Interstate Commerce Commission condemned as unreasonable the rates and tariff provisions at which the charges were computed before the transportation was performed. But an examination of the reports and orders of the Commission on which plaintiff relies shows no more than that the Commission enunciated therein principles or criteria in establishing rates and tariff provisions. The Commission neither found that the particular rates and tariff provisions at which defendant's charges to plaintiff were calculated were unreasonable nor ordered defendant to cancel them.

For example, in *Increases, Middle Atlantic and New England,* 49 M.C.C. 357 (1948), the Commission noted that existing rates filed with it pursuant to Section 217(a) of the Interstate Commerce Act for transportation beween Baltimore, Maryland, and Lynchburg, Virginia, were higher than the rates for transportation between Baltimore and Danville, Virginia. However, it further noted that such disparities were not unusual at points close to the border between two different ratemaking territories. It therefore did not order the rates between Baltimore and Lynchburg cancelled or changed, but merely told the carriers to take action to eliminate such disparities. Again in *Class Rates Between Middle Atlantic and New England*

Territories, 67 M.C.C. 741, 761 (1956), the Commission noted that the then effective rates between New York, New York, and Lynchburg, Virginia, were higher than those between New York and Gretna, Virginia. But again the Commission refused to order the higher rates cancelled or changed, contenting itself with telling the carriers to take steps to correct such disparities.

Moreover, in its report on plaintiff's complaint against the specific rates in issue here, which complaint is filed simultaneously with and as a necessary concomitant of its suits here, the Commission found that defendant's rates from New York to Lynchburg in fact resulted in lower total charges for such transportation than its total charges for transportation from New York to Gretna or Danville, because the latter transportation, unlike the former, did not include pickup of shipments at New York, for which a separate additional charge was made. Hence, the Commission refused to find defendant's rates from New York to Lynchburg unreasonable and its order did not direct defendant to change them.

As to the provision in its tariffs by which defendant limited its liability, it is true that in 1951 the Interstate Commerce Commission disapproved and issued an order requiring the cancellation of similar provisions. However, that order *did* not require cancellation of the specific provision in defendant's tariff of which plaintiff complains. Defendant was not ordered to cancel that provision until June 2, 1960, when the Commission issued its report and order on the complaint plaintiff filed simultaneously with, and as part of, its effort to effect the recovery it seeks here. In that report the Commission declined to consider the reasonableness of the charges plaintiff had paid defendant

in the past, i.e., the charges it seeks to recover in these suits, on the authority of the Supreme Court's opinion in *T.I.M.E., Inc., supra.* Hence, the order thereon merely directed defendant to cancel the provision in its tariff limiting its liability on or before August 10, 1960. Defendant complied with that order by filing a supplement to its tariff, which cancelled said provision as of August 10, 1960.

CONCLUSIONS OF LAW.

Upon the facts found, I conclude that the charges which plaintiff paid defendant for the shipments here in controversy were computed at the rates and tariff provisions duly filed with the Interstate Commerce Commission under Section 217(a) of the Interstate Commerce Act, and applicable to the transportation of such shipments performed during the periods of time set out in the complaints. While it is true that the Commission subsequently found unreasonable, and ordered cancelled, one of the tariff provisions on which the charges were in part based, and certain other rates had been criticized previously by the Commission, the transportation charges collected by defendant were based upon the rates and tariff provisions duly filed and in force at the time of the shipments here in controversy, and plaintiff was obliged to charge accordingly.

I conclude that the facts of this case bring it squarely within the ambit of the decision of the Supreme Court in the case of *T.I.M.E., Inc.* v. *U.S., supra.* I therefore conclude that plaintiff is not entitled to recover anything of the defendant in this consolidated action, and an order will be entered dismissing it at the cost of the plaintiff.

A. W. BARKSDALE
United States District Judge